Supreme Court of the United States

OCTOBER TERM 1941

No. 295

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada,

Petitioners,

against

OSCAR OTTO TOUR, INC.,

Respondent.

BRIEF FOR RESPONDENT

[redacted]
Attorneys for Respondent.

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against

OPERA ON TOUR, INC.,

Respondent.

BRIEF FOR RESPONDENT

Summary Statement of Matter Involved

Petitioners seek review of an order and judgment of the Court of Appeals of the State of New York, affirming a final judgment of the Supreme Court, New York County, entered after a trial before the Special Term.

Respondent is a corporation organized under the laws of the State of New York in 1938, for the purpose of presenting grand opera. The character of the performances is identical to that of the conventional grand opera with the single exception that the orchestral accompaniment is produced from transcriptions or recordings of the operatic score (R. 14). This form of production obviated the necessity of employing instrumental musicians (R. 15). Thus reducing the cost of production, respondent hoped to make

grand opera commercially feasible in those sections of the United States where grand opera is rarely if ever presented (R. 178-180).

Petitioners are two labor unions who were sued through their respective presidents. Petitioner Weber represents the American Federation of Musicians (hereinafter referred to as "Musicians' Union"), a national union of instrumental musicians, and the petitioner Browne represents the International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada (hereinafter referred to as the "Stagehands' Union"), an international union consisting of persons employed as stagehands, technicians and electricians. All stagehands and technicians in the employment of respondent were members of the Stagehands' Union (Findings 18 and 23, R. 16, 17). Neither respondent's employees nor the union to which they belonged had any grievance against the respondent (R. 268, 327).

The Musicians' Union was the source of the difficulty. No member of this union was employed or eligible for employment by the respondent, nor did the union seek to unionize respondent's shop. Respondent's business did not require instrumental musicians. That was this union's only grievance. The union refused to consider any adjustment of this controversy short of destruction of the respondent's business (R. 188-189). To accomplish its purpose the Musicians' Union enlisted the aid of the Stagehands' Union to put the respondent out of business. As a result of the combination between these two unions the respondent was deprived of stagehand labor without which it could not carry on its business. The respondent's enterprise was finally compelled to shut down and was not given the opportunity to compete on any terms with music furnished by live musicians.

Proceedings Below

The present action was then instituted by respondent for an injunction against the petitioners to restrain them from destroying its business by concerted action because of the use of recorded music. After a trial at Special Term, New York County, the petitioners were permanently enjoined from preventing the presentation by respondent of musical performances, from directing any person to leave respondent's employment or render services to respondent "on the ground that, or for the reason that, the plaintiff, Opera on Tour, Inc., uses recorded or transcribed or mechanically reproduced music in connection with its performances * * * or on any other ground which has its origin in or is due to steps or actions taken by the defendant unions in preventing the use by plaintiff of recorded or transcribed or mechanically reproduced music in connection with its performances" (R. 27, 28).*

This judgment was reversed by the Appellate Division, First Department, by a divided Court of 3 to 2, and the Court of Appeals by a divided Court of 4 to 2, in turn, reversed the Appellate Division, and reinstated and affirmed the judgment of the Special Term.

It should be noted at this point that the decree is not an absolute prohibition of the right to strike or picket as alleged by petitioners on page 3 of their petition, and upon which allegation they rest their claim to review by this Court.

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* The other grounds mentioned in the judgment, to wit: respondent's use of foreign-made records or the employment of one Schavitch, were included to prevent an evasion of the decree on specious grounds belatedly asserted by petitioners to justify their conduct herein. Judge Callahan, writing for the majority in the Appellate Division, referring to the latter contention and also to the contention that respondent used a non-union pianist at rehearsal, said that they "do not seem to have been advanced by defendants until after the stagehands quit work and after this action was commenced" (R. 1245; 258 A. D. 516, 518).

In order that there might be no misunderstanding of its ruling, the Court of Appeals took pains to say:

> "At the outset we note that there is in the decision of the case at bar no denial of the right to strike. On that issue our decisions are not in doubt" (R. 1274. 285 N. Y. 348, 353).

Concerted activity to compel respondent to abandon the use of recorded music—an objective declared unlawful—was enjoined. This was determined as a matter of local common law as applied to the particular facts before the Court in the instant case.

Reasons Relied On for Denial of Writ of Certiorari

The petition for certiorari here raises only questions of state law for, obviously, what does or does not constitute a lawful labor objective is not a Federal question. We respectfully submit that this Court should refuse to grant certiorari because:

1. No Federal question is involved.

2. No Federal question was raised by the petitioners in the courts below.

POINT I

No Federal question is involved.

The restrictions imposed upon petitioners by the decree herein is the use of their concerted powers to accomplish what the courts of New York have held in an illegal objective in the State of New York. Clearly the police powers of a state permit its courts to take such preventive action. True, to the extent stated in the decree the petitioners' freedom of action is restricted, but that is always the case with any decree in equity. The petitioners' position is based upon the untenable premise that they have the abso-

lute right to do anything they please—even to pursue an admittedly illegal objective—simply because they happen to be a labor union.

Petitioners place chief reliance in their petition and brief (Petition and Brief, pp. 7, 9, 10, 11, 15, 16) on this Court's reversal, on the authority of *American Federation of Labor* v. *Swing,* 312 U. S. 321, in the case of *Bakery & Pastry Drivers' Union* v. *Wohl* (June 2, 1941, No. 901, October Term, 1940). The identical issue—the right to picket where no employer-employee relationship existed—was involved in both the *Wohl* and *Swing* cases. That issue was stated by this Court in the *Swing* case as follows:

> "We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him" (312 U. S. 321, 325).

The successful petitioners to this Court in the *Wohl* case presented (Petition, p. 8) the same question in the following language:

> "May a State Court absolutely enjoin admittedly peaceful and orderly picketing by a legitimate labor organization, merely because that picketing is not directed against an employer of members of the Union?"

Curtailment of concerted activity in each of the above situations was declared constitutionally invalid.

The issue in the instant case differs substantially from that raised in the *Wohl* and *Swing* cases. The legality of petitioners' objective was here drawn in question and the Court of Appeals held:

> "For a union to insist that machinery be discarded in order that manual labor may take its place and thus secure additional opportunity of employment is not a lawful labor objective" (R. 1278). 285 N. Y. 348, 357.

The declared objective of petitioners—to compel the discontinuance of the use of a mechanical device—was branded illegal. Having reached this conclusion, the Court implemented its views by a decree which prevents the commission of acts in furtherance of an unlawful purpose. This Court and the Court of Appeals have consistently recognized that concerted labor action is enjoinable either where unlawful means are adopted to achieve a lawful end, or where the end itself is unlawful. The Court of Appeals speaking through Lehman, J., in *O'Keefe* v. *Local 463 of Ass'n of Plumbers,* 277 N. Y. 300, 308, speaks of "action reasonably calculated to achieve a lawful end by lawful means". *Cf. Exchange Bakery & Restaurant, Inc.* v. *Rifkin,* 245 N. Y. 260, 262. So, too, this Court in *Dorchy* v. *Kansas,* 272 U. S. 306, speaking through Mr. Justice Brandeis said at page 311:

> "But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. * * * Neither the common law, nor the Fourteenth Amendment confers the absolute right to strike. Compare *Aikens* v. *Wisconsin,* 195 U. S. 194, 204-205."

We contend that this case is governed by the ruling of this Court in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, which sustains the ancient right of a sovereign state to police its inhabitants through all branches of government. This decree must be judged by its application to the situation confronting the state court, and that court's interpretation of its local law not inconsistent with the Federal Constitution. In the *Milk Wagon Drivers Union* case, *supra,* this Court said at pages 292-293:

> "Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law."

Were this otherwise, every abridgement of freedom of action by injunction of a state court, on petitioners' theory, would raise a question under the Fourteenth Amendment. *Cf. Dorchy* v. *Kansas,* quoted *supra.*

A local question having been determined by the State Court, this Court is without jurisdiction to review. As this Court said in *American Railway Express* v. *Kentucky,* 273 U. S. 269, 272-273:

> "Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common. 'The due process clause does not take up the laws of the several states and makes all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.' *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 165, 166."

See also:

Kryger v. *Wilson,* 242 U. S. 171.

POINT II

No Federal question was raised by petitioners in the Courts below.

The attempt to raise questions of the alleged infringement of petitioners' rights under the Federal Constitution was made for the first time upon petitioners' application to the Court of Appeals for amendment of the remittitur of that Court "so as to show that questions under the Federal Constitution were presented and necessarily passed upon" (R. 1302). That application was denied (R. 1296).

The answer (R. 10-12) and petitioners' requests to find (R. 30-47), contain no suggestion of any constitutional question; nor was any such point raised upon the trial at the Special Term. The assertion by petitioners (Petition, p. 5) that the constitutional guarantee of free speech "was thus specifically drawn in question" is not supported by the

record. The quotation on that page is bodily torn from its context and an unwarranted meaning ascribed to it. The quotation is taken from a statement of respondent's counsel in the course of a colloquy during the trial. Challenging the petitioners' contention that there was an *absolute* right to strike, respondent's counsel, referring to the authority of *Dorchy* v. *Kansas, supra,* said:

> "Neither the common law nor the 14th amendment confers the absolute right to strike. That is what Judge Brandeis states in a decision in the United States Supreme Court * * *" (R. 122).

This is a far cry from a claim by petitioners that their constitutional rights were put in issue. This passing reference to the Fourteenth Amendment by counsel for *respondent* in answer to petitioners' extraordinary claim of immunity, has thus been twisted into a specific drawing into a question of the issue of the constitutional guarantee of free speech. Petitioners' defense at all times and in all Courts was limited to the argument that respondent did not state a cause of action under the New York common law and that Section 876-a of the Civil Practice Act, governing the issuance of injunctions in "labor disputes", applied (R. 67, 546). The record will be searched in vain in an effort to find any constitutional question raised by petitioners. Such questions were presented by petitioners, as indicated above, on the application in the Court of Appeals (R. 1301-1302) *for the first time.* They were not seasonably raised and cannot avail in this proceeding. *American Surety Co.* v. *Baldwin,* 287 U. S. 156.

The numerous references in the petition (pp. 5, 6) to various Federal authorities cited by petitioners in their briefs in the Courts below are without effect on the question now presented to this Court. Mr. Chief Justice Hughes, in *Lynch* v. *New York,* 293 U. S. 52, 54, has said:

"Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Eustis* v. *Bolles*, 150 U. S. 361, 366, 367; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Mellon* v. *O'Neil*, 275 U. S. 212, 214."

These requirements have not been met herein.

CONCLUSION

It is respectfully submitted that the writ of certiorari prayed for should be denied.

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